

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2015-000641

Tammy Vance and David Montorio, on behalf of themselves
and all other similarly situated Respondents

vs.

Horry Electric Cooperative Appellant

APPELLANT'S INITIAL BRIEF

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JUN 18 2015

SC Court of Appeals

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STATEMENT OF THE CASE

This class action was commenced by the filing of the Summons and Complaint on February 9, 2011. In the Complaint, the plaintiffs sought class certification based upon the following allegations:

"7. Each residence owned by the Plaintiffs and Plaintiff Class was constructed between 1988 and 2003 according to standards and specifications set forth and required by Defendant through the Defendant's 'New Good Cents Program' (hereinafter the 'Program'). All Program Homes were homes that were newly constructed as opposed to retrofits of existing structures."

"15. The documentation and process used by Defendant for Good Cents homes were nearly identical for each home in the Program.

16. The specification and requirements had to be implemented as designed and set out by Defendant for acceptance of the home by Defendant into the Program.

17. Defendant required a vapor barrier to be installed on the inside of the exterior walls of all residences. The Defendant set forth specifications to meet the infiltration barrier requirements. The Defendant specified two methods of achieving superior infiltration and vapor protection:

(a) Method One

(i) 4 or 6 mil polyethylene vapor barrier installed on the inside surface of the exterior walls and ceilings
(ii) properly installed friction fit batts
(iii) properly installed house wrap (such as Tyvek) as an air barrier

(b) Method Two

(i) properly installed Kraft or foil-faced insulation batts
(ii) taped and painted gypsum board installed on the inside of the exterior wall
(iii) properly installed house wrap (such as Tyvek) as an air barrier

18. Defendant further required that Defendant inspect the installation of a vapor barrier during construction so that Defendant could verify that it was installed.

19. Each Plaintiff's Residence has a vapor barrier in accordance with Defendant's design specifications, requirements and standards.

20. Each Program residence was inspected by Defendant.
21. Each Program residence was accepted into the Program by the Defendant.
22. On information and belief, Defendant inspected each of the Plaintiffs' and Plaintiff Class' homes during construction to verify that the vapor barrier was installed on the inside of the exterior walls.
23. The existence of a vapor barrier on the inside of the exterior walls creates a condition where condensation forms on the outer surface of the vapor barrier. The presence of condensation causes, among other things, mold growth on the surface of the vapor barrier and inside the Plaintiffs' and Plaintiff Class' homes." (Complaint filed February 9, 2011)

The Trial Judge certified the class by an Order dated August 21, 2012 in which class membership was defined as follows:

"The class is defined as each and every Horry County homeowner of a new Good Cents Program Home that has a vapor barrier, on the inside of its exterior walls and was included by the Defendant in the new Good Cents Program Home upon its construction during years 1988 through 2003. All persons within the Class who do not elect to exclude themselves from ('opt out of') the Class are referred to as class members." (Order dated August 21, 2012, p.4)

Later, the Trial Judge found that claims prior to 1998 were barred by the statute of repose and the class was reduced to those who had constructed a new Good Cents home between 1998 and 2003.

The action was settled by a Final Approval Order dated May 30, 2014. Class members were entitled to receive \$2,000.00 or receive up to \$12,000.00 from a Remediation Fund.

Thereafter, during the administration of the settlement, HEC discovered that the class list included some 30+ individuals who did not have a Good Cents new homes but instead had manufactured homes. HEC also discovered some 12 claimants on the list who had never qualified for the Good Cents program. Finally,

there were a number of late filings. HEC filed a motion to obtain guidance from the Court as to how to handle these claims.

A hearing was held on HEC's motion on November 13, 2014. Following the hearing, the Trial Judge issued an Order in which he made the following findings:

- “1. the list of class members was generated primarily by HEC's identification of people who participated in the 'Good Cents Program' during the construction of their homes in the time period set by the court;
2. the class action settlement approved by the court allows those identified as class members to participate in the settlement;
3. subsequent to the court's approval of the class action settlement, HEC claims that it erroneously identified certain individuals as class members and that those individuals are not entitled to recovery under the settlement because they do not meet the definition of class members, said allegations being disputed by the plaintiffs;
4. HEC proposes that the court hold an evidentiary hearing for each individual whose continued identification as a class member is in dispute, with the individual bearing the burden of proving that he/she should be included as a class member; and
5. the relief sought by HEC defeats the intended purpose of class certification in class actions.” (Order dated February 3, 2015, p.2)

Based thereon, Judge Culbertson denied HEC's motion. He granted the Class Representatives' motion to compel. He ordered HEC to pay all claimants identified as class members pursuant to the Settlement Agreement dated February 28, 2014.

This appeal was taken after Judge Culbertson denied HEC's motion to reconsider by an Order dated March 3, 2015.

I.

THE TRIAL JUDGE MISAPPREHENDED HEC'S MOTION IN CONCLUDING THAT HEC PROPOSED THAT THE COURT HOLD AN EVIDENTIARY HEARING FOR EACH INDIVIDUAL WHOSE CONTINUED IDENTIFICATION AS A CLASS MEMBER WAS IN DISPUTE.

In his Order, the Trial Judge made the following finding:

"4. HEC proposes that the court hold an evidentiary hearing for each individual whose continued identification as a class member is in dispute, with the individual bearing the burden of proving that he/she should be included as a class member" (Order dated February 3, 2015, page 2)

However, HEC never made such a proposal. (Transcript of Record dated November 13, 2014, pp.1-26) In fact, HEC's attorney made clear that he did not agree that individual evidentiary hearings were needed.

"MR. JOHNSON: Your Honor, it seems to me that if – again, if they show us something that – you know, if we had an opportunity to meet, go down the list and determine how many we had, and we have a difference on some of them, and we have our numbers – are ultimate numbers from the affidavits we submitted yesterday are hard, and fast, and correct, and, if anything, Your Honor, I'd ask you, at a minimum, I would ask you to hold – withhold ruling on that and direct the parties to try and verify the ones who are actually on the list or not and determine the matter after that occurred as opposed to just saying that they have 32 evidentiary hearings.

THE COURT: Well, you're saying 299 evidentiary hearings.

MR. JOHNSON: No. No, sir. I'm saying---

THE COURT: Well, you've got people – there's 299 class members to whom checks were mailed and---

MR. JOHNSON: No, sir.

THE COURT: ---they got people who are saying I never got my check including one of the class representatives who just got their check.

MR. JOHNSON: All right. Your Honor, what you'll find is we say that 31 people have named – if they say there's none – if they show us that – any of them are incorrect, we'll correct them."

(Transcript p.20, line 13 to p.21, line 12)

At the hearing, the Trial Judge seemed to be confused as to HEC's position. He repeatedly asked about the need for 299 individual evidentiary hearings, which was never an issue.

"MR. JOHNSON: Your Honor, I think if this were a motion for summary judgment these people should not have been in, they had a counter motion for summary judgment and there were disputes, they would have to be determined by an evidentiary hearing.

Okay. I'm not saying we need that, but---

THE COURT: Well then how do we settle?

I mean either we enforce the list or else we're gonna have to have an evidentiary hearing on everybody that Horry Electric says shouldn't be in the class and every member that says yes, I should be in the class.

MR. JOHNSON: Your Honor, I believe that, quite frankly, if they'll tell us any, any specifically we'll either agree to an evidentiary hearing on those limited people or we'll trade it out. But the answer shouldn't be for people who aren't on the list to start with to get a windfall in this matter because there were errors made that were good faith errors. I mean nobody's trying to keep somebody from getting---

THE COURT: And I understand that, but I mean you got 299 class members. We can't have 299 evidentiary hearings to determine whether or not a person isn't a member of a class. That's why they come up with a list.

MR. JOHNSON: Your Honor, it seems to me that if -- again, if they show us something that -- you know, if we had an opportunity to meet, go down the list and determine how many we had, and we have a difference on some of them, and we have our numbers -- are ultimate numbers from the affidavits we submitted yesterday are hard, and fast, and correct, and, if anything, Your Honor, I'd ask you, at a minimum, I would ask you to hold -- withhold ruling on that and direct the parties to try and verify the ones who are actually on the list or not and determine the matter after that occurred as opposed to just saying that they have 32 evidentiary hearings.

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MR. JOHNSON: All right. Your Honor, what you'll find is we say that 31 people have named – if they say there's none – if they show us that – any of them are incorrect, we'll correct them.” (Transcript p.19, line 15 to p.21, line 12)

What HEC requested was that the parties be required to meet and identify by categorizing the individuals whose claims were denied, and once the list was tied down, determine what should be done.

There is no basis in the record for the Judge's finding that HEC's counsel proposed individual hearings. Since there is no basis for his denial of HEC's motion and is without factual support, his order must be set aside.

II.

THE TRIAL JUDGE ERRED IN FINDING THAT HOLDING A HEARING OR INDIVIDUAL HEARINGS WOULD DEFEAT THE PURPOSE OF THE CLASS ACTION, SINCE IT IS COMMON PLACE IN CLASS ACTIONS FOR SEVERAL ISSUES TO BE CERTIFIED AND OTHER ISSUES BE RESOLVED ON AN INDIVIDUAL BASIS.

In this case, the Trial Judge took HEC's motion under advisement and crafted and issued his own order. At the hearing, he stated that he intended to do some research.

In his order, he made the following finding:

“5. the relief sought by HEC defeats the intended purpose of class certification in class actions.” (Order dated February 3, 2015, p.2)

His order did not cite any authority for his ruling.

It is true that the purpose of a class action is to avoid the necessity of requiring

each member of the class to prove the elements of the cause of action. *O'Quinn v. Beach Associates*, 272 S.C. 95, 249 S.E.2d 734 (1978). However, it is not uncommon to have certain issues affecting the entire class determined in the class action, with individual hearings being held to determine individual issues such as damages. For example, in *Butler v. Sears, Roebuck and Co.*, 702 F.3d 359 (2012), the court stated:

"The principal issue is whether the control unit was indeed defective. The only individual issues – issues found in virtually every class action in which damages are sought – concern the amount of harm to particular class members. It is more efficient for the question whether the washing machines were defective – the question common to all class members – to be resolved in a single proceeding than for it to be litigated separately in hundreds of different trials, though, were that approach taken, at some point principles of res judicata or collateral estoppel would resolve the common issue for the remaining cases."

In *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796 (2013), the court stated:

"It would drive a stake through the heart of the class action device, in cases in which damages were sought rather than an injunction or a declaratory judgment, to require that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined in individual hearings, in settlement negotiations, or by creation of subclasses, the fact that damages are not identical across all class members should not preclude class certification. Otherwise defendants would be able to escape liability for tortious harms of enormous aggregate magnitude but so widely distributed as not to be remediable in individual suits."


Here, it is not a matter of deciding whether certain issues should be determined by the class action and other issues be determined on an individual basis. Instead, all the Trial Judge was asked to do was to enforce its definition of class membership and to determine how untimely claims be resolved.

In this case, the Trial Judge by his Order dated May 30, 2014 retained

jurisdiction over all matters relating to the administration and consummation of the Settlement Agreement. The issues such as are involved in this appeal are the very issues for which jurisdiction was retained. Individuals who do not meet the definition for class membership should not be paid or receive a windfall.

CONCLUSION

The Trial Judge's Orders dated February 3, 2015 and March 3, 2015 should be reversed and the action should be remanded to the Trial Judge with instructions to require the parties to generate a list of disputed claims and then determine which claims, if any, should be paid.



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June 18, 2015

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Benjamin H. Culbertson, Circuit Court Judge

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Tammy Vance and David Montorio, on behalf of themselves
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PROOF OF SERVICE

I, Sherry W. Wise, of Pope D. Johnson, III, Attorney at Law, hereby certify that I have served Nate Fata, T. Christopher Tuck, and James L. Ward, attorneys for the Respondents, with the following pleadings by mailing a copy of same, postage prepaid and return address clearly indicated, to them at the following addresses on the 18th day of June, 2015.

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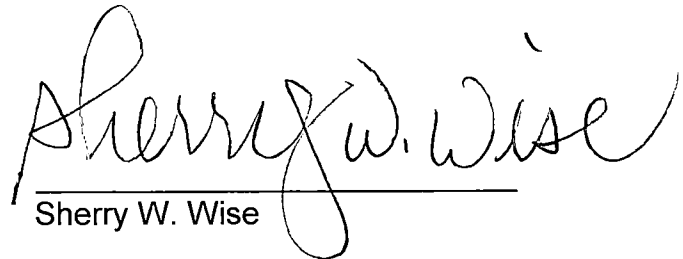
PLEADINGS:

Appellant's Initial Brief

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SC Court of Appeals



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June 18, 2015

(Via Hand Delivery)

Honorable Jenny Abbott Kitchings
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South Carolina Court of Appeals
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RE: Tammy Vance and David Montorio, on behalf of themselves and all others
similarly situated v. Horry Electric Cooperative
Case No. 2015-000641

Dear Ms. Kitchings:

Enclosed herewith are the original and a copy of **Appellant's Initial Brief** and **Appellant's Designation of Matter to be Included in Record on Appeal** regarding the above-referenced action. Please file the originals and clock and return the additional copy of each to me.

With a copy of this letter to Nate Fata, T. Christopher Tuck, and James L. Ward, attorneys for the Respondents, I am serving a copy of the Initial Brief and Designation of Matter upon them.

Sincerely,


Pope D. Johnson, III

PDJIII/sww
Enclosures

cc: Nate Fata, Esquire
T. Christopher Tuck, Esquire
James L. Ward, Esquire

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